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ROBERT HUNTER BIDEN

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **WESTERN DIVISION**

19 ROBERT HUNTER BIDEN, an
20 individual,

21 Plaintiff,

22 vs.

23 PATRICK M. BYRNE, an individual,
24 Defendant.

Case No. 2:23-cv-09430-SVW-PD

**PLAINTIFF ROBERT HUNTER
BIDEN'S OPPOSITION TO
DEFENDANT'S MOTION IN
LIMINE NO. 2 TO EXCLUDE
TESTIMONY OR EVIDENCE OF
PLAINTIFF'S SEVERE ALLEGED
EMOTIONAL DISTRESS**

Date: November 25, 2024
Time: 3:00 P.M.
Place: Ctrm. 10A

Judge: Hon. Stephen V. Wilson

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 By this motion in limine, Defendant Patrick M. Byrne seeks to exclude any
4 evidence or testimony of the emotional distress that Plaintiff Robert Hunter Biden
5 suffered as a result of the defamatory statements that Defendant made about Plaintiff
6 on the grounds that Plaintiff has not presented any evidence of such emotional distress
7 except his own testimony.¹ This motion should be denied because it is an improper
8 attempt to weigh evidence and seek a dispositive ruling. *See Dubner v. City & Cnty.*
9 *of S.F.*, 266 F.3d 959, 968 (9th Cir.2001) (A motion in limine is not the proper vehicle
10 for seeking a dispositive ruling on a claim, particularly after the deadline for filing
11 such motions has passed); *C & E Servs., Inc. v. Ashland Inc.*, 539 F.Supp.2d 316, 323
12 (D.D.C. 2008) (“a motion in limine should not be used to resolve factual disputes or
13 weigh evidence.”). In fact, evidence of emotional distress can be presented by
14 Plaintiff and other witnesses who observed Plaintiff. *See Carey v. Piphus*, 435 U.S.
15 247, 264 n.20 (1978) (the extent of emotional distress may “be proven by reference
16 to the injured party's conduct and observations by others”); *Stout v. Comm'r, Soc. Sec.*
17 *Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006) (in the context of a disability
18 determination, “lay testimony as to a claimant's symptoms or how an impairment
19 affects [his] ability to work is competent evidence”); *Zhang v. Am. Gem Seafoods,*
20 *Inc.*, 339 F.3d 1020, 1040– 41 (9th Cir. 2003) (upholding compensatory damages
21 award based in part on plaintiff's emotional distress testimony that he was
22 “troubled,”); *Passantino v. Johnson & Johnson Cons. Prods., Inc.*, 212 F.3d 493, 513
23 (9th Cir. 2000) (a jury may also rely on the plaintiff's own testimony about their
24 emotional distress when determining its award). Plaintiff will testify about the
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27 ¹ Defendant’s motions in limine should be denied because they are untimely and
28 because Defendant’s counsel did not meet and confer with Plaintiff’s counsel on any
motion in limine. Declaration of Zachary Hansen, ¶¶ 3-4, Exh. “A.”

1 emotional distress he suffered. In addition, Plaintiff's wife, Melissa Cohen Biden,
2 will also testify about her observations of Plaintiff's emotional distress and Dr. Alyssa
3 Berlin, Plaintiff's treating physician, may testify about her observations of Plaintiff's
4 emotional distress and her treatment of such condition. Defendant has recognized all
5 of this likely lay testimony in his Motions In Limine Nos. 1 and 2 and it is proper.
6 Accordingly, this motion should be denied.

7 **II. ARGUMENT**

8 Motions in limine are procedural devices to obtain an early and preliminary
9 ruling on the admissibility of evidence. *United States v. Heller*, 551 F.3d 1108, 1111
10 (9th Cir. 2009). Although the Federal Rules of Evidence do not explicitly authorize
11 motions in limine, the Supreme Court has noted that trial judges have developed the
12 practice pursuant to their authority to manage trials. See *Luce v. United States*, 469
13 U.S. 38, 41 n. 4 (1984). Trial courts have broad discretion when ruling on
14 motions in limine. See *Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir.
15 2002).

16 However, "a motion in limine should not be used to resolve factual disputes or
17 weigh evidence." *C & E Servs.*, 539 F.Supp.2d at 323. A motion in limine is not the
18 proper vehicle for seeking a dispositive ruling on a claim, particularly after the
19 deadline for filing such motions has passed. See *Dubner*, 266 F.3d at 968; see also
20 Jones, et al., Rutter Group Prac. Guide Fed. Civ. Trials & Evid., ¶ 4:345 (The Rutter
21 Group, 2006) ("Motions *in limine* may not be used, however, as a disguise for a
22 motion for summary judgment or to dismiss.").

23 "Motions in limine that seek exclusion of broad and unspecific categories of
24 evidence, however, are generally disfavored." *Kaneka Corporation v. SKC Kolon PI,*
25 *Inc.*, 2015 WL 12696109, *2 (C.D.Cal. 2015) (quoting *Sperberg v. The Goodyear*
26 *Tire and Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975)). Courts have recognized that
27 it "is almost always better situated during the actual trial to assess the value and utility
28 of evidence. [citation omitted]...Therefore, when confronted with this situation, "a

1 better practice is to deal with questions of admissibility of evidence as they arise [in
2 actual trial]” as opposed to tackling the matter in a vacuum on a motion in limine.
3 [Citation omitted].” *Kaneka*, 2015 WL 12696109, *2. Here, Plaintiff seeks to
4 exclude the broad category of any evidence of emotional distress. That is improper
5 on its face and should be denied.

6 **A. This Motion Is A Disguised Summary Judgment Motion To**
7 **Preclude An Entire Category Of Plaintiff’s Damages.**

8 Defendant’s basis for excluding evidence of emotion distress is that Plaintiff
9 does not have any evidence, except for his “self-serving” testimony. That reasoning
10 demonstrates that this motion is a disguised summary judgment motion because, on
11 its face, it is clear that it requires the weighing of evidence. *See Kaneka*, 2015 WL
12 12696109, *2 (“...a motion in limine should not be used to resolve factual disputes
13 or weigh evidence.” [Citation omitted]. That is the province of the jury. [Citation
14 omitted]. Nor should a motion in limine be used as a substitute for a motion for
15 summary judgment”).

16 As an example, in *Beckman v. American Airlines, Inc.*, 2024 WL 4003903, *3-
17 4 (C.D.Cal. 2024), the defendant, on a motion in limine, argued that the plaintiffs
18 should be prohibited at trial from offering evidence that the plaintiff was the victim
19 of assault and providing an argument for negligent infliction of emotion distress upon
20 Beckman. (Def. MIL No. 4). The Court denied both these motions in limine on the
21 grounds that they were an improper vehicle to move for summary judgment on an
22 issue because it required the weighing of evidence. *Id.* (citing *C & E Servs., Inc. v.*
23 *Ashland Inc.*, 539 F. Supp. 2d 316, 323 (D.D.C. 2008) (A motion in limine “should
24 not be used to resolve factual disputes or weigh evidence.”); *see also Boeing Company*
25 *v. KB Yuzhnoye*, 2015 WL 12803452, *2-3 (C.D.Cal. 2015) (denying the plaintiff’s
26 motion in limine as an improper attempt to prevent the defendant from actually
27 defending itself).

28 The same situation exists here as the only basis Defendant has for its motion is

1 that “there is no evidence of emotional distress.” Accordingly, the motion should be
2 denied.

3 **B. Emotional Distress Damages Can Be Based on Plaintiff’s Own**
4 **Testimony about his feelings and symptoms and on Other Persons**
5 **testimony of observations of Plaintiff.**

6 Emotional damages awards need not be supported by “some kind of ‘objective’
7 evidence.” *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493,
8 513 (9th Cir. 2000). Instead, those damages can be established, among other ways, by
9 a plaintiff’s testimony about his harm *and the testimony of others about that harm*.
10 *See id.* Emotional distress is “essentially subjective.” *Carey v. Phipus*, 435 U.S. 247,
11 264 n.20 (1978). For these reasons, determinations about “intangible, non-economic
12 losses” are “peculiarly within a jury’s ken.” *Holzhauer v. Golden Gate Bridge*
13 *Highway & Transportation Dist.*, 2017 WL 3382316, at *2 (N.D. Cal. Aug. 7, 2017),
14 *aff’d*, 743 F. App’x 843 (9th Cir. 2018) (quoting *Smith v. Kmart Corp.*, 177 F.3d 19,
15 30 (1st Cir. 1999) (internal quotation marks omitted).

16 By way of example, in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020,
17 1040-41 (2003), the Court held that the plaintiff’s testimony alone is enough to
18 substantiate the award of emotional distress damages. Plaintiff testified that the job at
19 American Gem was “my dream, working in this country,” and that when he was
20 terminated, he was “troubled,” and that letters sent by the defendant to his suppliers
21 stating that “ruined my future business...Because doing business in China, your
22 reputation and your credibility is the key.”

23 As another example, in *Shoraka v. Bank of America, N.A.*, 2023 WL 8709710,
24 *7 (C.D.Cal. 2023), the Court held that the plaintiff’s testimony that he suffered
25 emotional distress was sufficient to raise a jury question regarding whether the
26 plaintiff in fact suffered emotional distress. Plaintiff testified that he experienced
27 anxiety, loss of sleep, stomach pain, loss of appetite, and weight loss due to the stress
28 of dealing with the defendant regarding the fraud claims. *Id.* While the defendant

1 argued that the plaintiff was not credible, the Court held that such issue was to be
2 determined by the jury.

3 Here, Defendant admitted in the motion that evidence of emotional distress
4 exists in the form of Plaintiff's "self-serving" testimony. And, other witnesses (i.e.,
5 Melissa Cohen Biden and Dr. Alyssa Berlin) can testify to their observations of
6 Plaintiff's symptoms of emotional distress. Hansen Decl., ¶ 2. As recognized by
7 Defendant Federal Rule of evidence 701 permits opinion testimony if it is: (a)
8 rationally based on the witness's perception; (b) helpful to clearly understanding the
9 witness's testimony or to determining a fact in issue; and (c) not based on scientific,
10 technical, or other specialized knowledge within the scope of Rule 702." Accordingly,
11 rather than excluding wholesale categories of evidence now, the Court
12 should deal with "questions of admissibility of evidence as they arise [in actual
13 trial]...." *Kaneka*, 2015 WL 12696109, *2.

14 **C. The Probative Value of Evidence of Plaintiff's Emotional Distress**
15 **Outweighs Any Alleged Prejudice to Defendant.**

16 Citing Federal Rule of Evidence 401, Defendant also argues that the prejudice
17 to him from the presentation of evidence of emotional distress substantially outweighs
18 its probative value. That argument is nonsensical. Plaintiff alleged in the complaint
19 that he suffered emotional distress damages as a result of Defendant's defamatory
20 comment about Plaintiff and Defendant admits that Plaintiff will testify that he
21 suffered emotional distress. It is thus part of Plaintiff's case and highly probative of
22 damages. *See Sandigo v. Ocwen Loan Servicing, LLC*, 2019 WL 2579341, *3
23 (N.D.Cal. 2019). Defendant's argument of prejudice should be rejected.

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1 **III. CONCLUSION**

2 For the foregoing reasons, the Court should deny Defendant's Motion In
3 Limine No. 2.

4 Dated: November 13, 2024

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GIZER & MCRAE LLP

7 By: /s/ Zachary C. Hansen

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25 *Attorney for Plaintiff*
26 *Robert Hunter Biden*

DECLARATION OF ZACHARY HANSEN

I, Zachary C. Hansen, declare and state as follows:

1. I am counsel of record for Plaintiff Robert Hunter Biden (“Plaintiff”) in the above-entitled action and am over the age of 18. I hereby submit this declaration in support of Plaintiff’s Opposition To Defendant’s Motion In Limine No. 2 To Exclude Testimony Or Evidence Of Plaintiff’s Severe Alleged Emotional Distress. If called as a witness, I would and could testify to the matters contained herein.

2. In support of Plaintiff’s emotional distress damages, Plaintiff will testify that he suffered emotional distress and will describe his symptoms. In addition, Plaintiff’s wife Melissa Cohen Biden and Dr. Alyssa Berlin, Plaintiff’s treating physician, can testify to their observations of Plaintiff’s symptoms of emotional distress.

3. Defendant’s counsel, Michael Murphy, Esq., did not attempt to meet and confer with me on these Motions In Limine. I attempted to meet and confer with Mr. Murphy the week of October 28, 2024, but he said that he was unavailable that week due to his other time sensitive deadlines. Attached hereto as **Exhibit “A”** is a true and correct copy of this email exchange dated October 28, 2024 through November 1, 2024.

4. All of Defendant’s Motions In Limine, including this motion, were filed on Wednesday, November 6, 2024, between 4:30 pm and 5:00 pm PST, with a hearing date of November 25, 2024, on nineteen days notice instead of the required 21 days notice. I never granted Defendant any extensions on the deadline to file Motions in Limine.

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1 I declare under penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct. Executed on this 13th day of
3 November, 2024, at Summit, New Jersey.

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5 /s/ Zachary C. Hansen
6 Zachary C. Hansen
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